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Lectures
On
JURISPRUDENCE AND ADAT LAWS

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SOURCES OF SHARI'AH (ADILLAH SHAR'IYYAH) PRIMARY SOURCES

➤ QURAN

➤ Theory of Abrogation (Nasikh wa Mansukh)

➤ SUNNAH

➤ IJMA'

➤ QIYAS

The primary sources of Islamic law are as provided as follows:

- **The Holy Qur'an.** It is the speech of Allah sent down upon the last Prophet Muhammad, through Angel Jibreel, in its precise wording and meaning, transmitted to us by numerous persons both verbally and in writing.
- **The Sunna.** It is the actual explanation and practical demonstration of the Qur'an. It refers to the sayings, actions or deeds of the Prophet and actions of the companions which he tacitly approved.
- **Ijma.** It means the consensus of the Muslim jurists of any particular period after the death of the Prophet Muhammad SAW concerning a Legal Ruling. In its legal sense, it is those principles of law which are accepted unanimously.
- **Qiyas.** It is a process of deducing a rule of law based on the Qur'an, Tradition, or Ijma in matters which have not been provided by a Text.

NASKH (ABROGATION)

The existence of abrogation within Islamic legislation is among the manifestations of human welfare considerations in Islamic legislation. God may prescribe a law suitable to people at the time of its enactment, or it may serve a particular limited purpose. However, its suitability may later disappear or its unique purpose may have been achieved. In such circumstances, the need for the law ceases to exist and its validity becomes cancelled.

NASKH (ABROGATION) (cont.)

Allah, may He be exalted, has told us of His wisdom in abrogation, and that whenever He abrogates any verse “*or cause[s] [it] to be forgotten*” i.e., causes people to forget it and removes it from their hearts “*We bring a better one*” that is more beneficial for you “*or similar to it.*” This indicates that the abrogation will not be less beneficial to you than the original ruling, because Allah’s bounty always increases, especially for this ummah, for which He has made its religion very easy.

NASKH (ABROGATION) (cont.)

- TYPES OF *NASKH*

There are basically four different types of *naskh* which can take place between the two sources of divine law, the Qur'aan and the *Sunnah*.

The first is the *naskh* of the Qur'an by the Qur'an. In this type of *naskh*, a Qur'anic verse containing a law is superseded by another Qur'anic verse containing a new law. An example can be found in the verses on immoral women. The early law was stated in the Qur'aan as follows:

“And for those of your women who have illicit relations, seek four witnesses among you. If they bear witness, confine the women in houses until they die or until Allaah makes another way for them.”

This law was abolished and replaced by the following law of lashing:

“Lash both the fornicator and the fornicatress one hundred times each.”

NASKH (ABROGATION) (cont.)

The second type is *naskh* of the Qur'an by the *Sunnah*. There is controversy as to whether this category exists. Those who affirm it give as an example of it the verse on wills, wherein Allaah instructs the believers as follows:

“It is prescribed for each of you to have a bequest for your parents and relatives if any of you nears death and leaves wealth.”

This early law was replaced by the inheritance laws and repealed by the hadeeth in which the Prophet SAW said:

“Verily Allaah has given every one with a right his rightful (share in the inheritance) so there is no bequest for one who inherits.”

NASKH (ABROGATION) (cont.)

The third is the *naskh* of the *Sunnah* by the Qur'an; that is, the abolition and replacement of an Islamic law which the Prophet SAW taught by the law in a verse revealed in the Qur'an. An example of this type of *naskh* is when prayer in the direction of Jerusalem was abolished. Muslims prayed towards Jerusalem, following the example of the Prophet (r) until they emigrated to Madeenah. After their settling in Madeenah, Allaah revealed the verse,

“So turn your face toward *al-Masjid al-Haraam* (Makkah) and wherever you all may be, turn your faces toward it.”

NASKH (ABROGATION) (cont.)

The fourth type of *naskh* is that of the *Sunnah* by the *Sunnah*. This type of *naskh* involves the annulment of a law found only in the *Sunnah* of the Prophet SAW by a later law expressed in the *Sunnah*. An example of this type of *naskh* can be found in the following statement of the *sahaabee* Jaabir ibn 'Abdullaah: “*The latter of the Messenger of Allaah's SAW two commands was to not make wudoo' after (eating) things touched by fire.*” In the early period of Islam, the Prophet had commanded his followers to make wudoo' before praying if they had eaten cooked food, but in the later period he told them that it was no longer necessary to do so.

NASKH (ABROGATION) (cont.)

The abrogation that occurred in the Qur'an was of three different types:

1. Abrogation of both the ruling and the verses

There is consensus on this type of abrogation among those Muslims who accept the concept abrogation. Proof that it occurred is seen in the report from 'Aa'ishah (may Allah be pleased with her) who said: Among the things that were revealed of the Qur'an was that ten definite breastfeedings make a person a mahram, then that was abrogated and replaced with five definite breastfeedings, and the Messenger of Allah (blessings and peace of Allah be upon him) passed away when this was among the things that were still recited of the Qur'an. Narrated by Muslim, 1452.

NASKH (ABROGATION) (cont.)

2. Abrogation of the ruling but not the verses

This is indicated in many verses, such as the verse which speaks of giving charity before speaking to the Messenger, which is the verse in which Allah, may He be exalted, says (interpretation of the meaning): “*O you who believe! When you (want to) consult the Messenger (Muhammad SAW) in private, spend something in charity before your private consultation*” [al-Mujaadilah 58:12]. This was abrogated by the verse in which Allah, may He be exalted, says (interpretation of the meaning): “*Are you afraid of spending in charity before your private consultation (with him)? If then you do it not, and Allah has forgiven you, then (at least) perform As-Salat (Iqamat as-Salat) and give Zakat and obey Allah and His Messenger.*” [al-Mujaadilah 58:13]. The ruling mentioned in the first verse is abrogated by the ruling mentioned in the second verse, although both verses remain.

NASKH (ABROGATION) (cont.)

3. Abrogation of the verses but not the ruling

this is indicated in the saheeh report from ‘Umar ibn al-Khattaab and Ubayy ibn Ka‘b, according to which they said: Among the words that were revealed of the Qur’an were the words, “If an old man and an old woman commit zina, stone them both.” But we know that this verse no longer exists on the pages of the Mushaf or of the lips of those who recite the Qur’an, even though the ruling remains in effect and has not been abrogated.

SUNNAH

The Sunnah has many technical definitions according to the different uses of the terminology used by the fuqahaa', muhaditheen, theologians, and usooles (Scholars of Jurisprudence)

- Arabic Language: The way of life, or tradition
- Fuqahaa': Mustahab
- Muhaditheen: The life of the Prophet sal'Allaahu 'alayhi wasallam , including his habits, appearance and attributes, even before Islam, as well as his examples, statements, and his approvals and disapprovals.
- Theologians ('Ulama): Sunnah vs. Bid'ah (the straight path to Allah in belief and practices)
- Usooles: The Prophet's sal'Allaahu 'alayhi wasallam examples, statements, and his approvals and disapprovals.

SUNNAH (cont.)

1. Definition

All that is narrated from the Prophet sal'Allaahu 'alayhi wasallam , his acts, his sayings and whatever he has tacitly approved.

2. As a source of law

“I left two things among you. You shall not go astray so long as you hold on to them: the Book of Allah & my Sunnah.”

3. An act, Sunnah Fi'liyyah (actual)

Aisha narrates, “The Messenger of Allah used to eat with his right hand and drink with his right hand.”

4. A saying, Sunnah Qawliyyah (verbal)

Omar narrates, “Deeds are judged by their intentions...”

5. A tacit approval, Sunnah Taqreeiyyah

Anas narrates, “Handshaking was a common practice amongst the Companions of the Messenger of Allah.”

SUNNAH (cont.)

6. Sunnah vs. Hadith

- a. Hadith is a narration of the conduct of the Prophet sal'Allaahu 'alayhi wasallam.
- b. Sunnah is the example and the law that is deduced from the conduct itself (the actual ruling that is derived from the hadith)

The definition used in this study is that of the Usoolees which serves the concept of legislation.

Classifications of Hadith

- Classification of Hadith According to the Number of Reporters involved in each stage of the Isnad:
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- Mutawattir -is one which is reported by such large number of people that they cannot be expected to agree upon a lie, all of them together.
- Example of Mutawattir practices are the 5 daily prayers, fasting, Zakah, Hajj, and recitation of the Holy Qur'an
- Example of verbal mutawattir hadith at least narrated by 62 persons:
- “whoever invent a lie and attributes it to me intentionally let him prepare his seat in the fire.”

Classifications of Hadith (cont.)

- Hadith Ahad or Khabar Wahid - is one which is narrated by people whose number does not reach that of the Mutawattir.
- Ahad is classified into 3 namely:
 - Gharib (scarce or strange)- when only a single reporter is found relating it at some stage of the Isnad.
 - Example : “Travel is a piece of punishment” is considered gharib
 - Aziz - If at any stage in the isnad, only two reporters are found to narrate the hadith, it is termed `Aziz ("rare, strong"). For example, Anas reported that the Messenger of Allah (may Allah bless him and grant him peace) said, "None of you (truly) believes until I become more beloved to him than his father, his son, and all the people."
 - A hadith which is reported by more than two reporters is known as Mash'hur ("famous"). According to some scholars, every narrative which comes to be known widely, whether or not it has an authentic origin, is called Mash'hur.

Classifications of Hadith (cont.)

Classification of Hadith according to the authenticity of its narrators

- **Sahih** - hadith is the one which has a continuous isnad, made up of reporters of trustworthy memory from similar authorities, and which is found to be free from any irregularities (i.e. in the text) or defects (i.e. in the isnad).“
- **Hasan**- a hadith which is not Shadhdh, nor contains a disparaged reporter in its isnad, and which is reported through more than one route of narration "It is the one where its source is known and its reporters are unambiguous."
- is one which excels the Da`if but nevertheless does not reach the standard of a Sahih hadith.
- Examples of Hasan hadith:
 - Malik, Abu Dawud, al-Tirmidhi and al-Hakim reported through their isnads from `Amr b. Shu`aib --- his father --- his grandfather, that the Messenger of Allah (may Allah bless him and grant him peace) said,
 - "A single rider is a devil (i.e. disobedient), two riders are two devils, but three makes a travelling party."

Classifications of Hadith (cont.)

- **Da`if** - hadith which fails to reach the status of Hasan is Da`if. Usually, the weakness is one of **discontinuity in the isnad**.
- **Maudu`** - (fabricated, forged) as the term applied to a hadith, the text of which goes against the established norms of the Prophet's sayings (may Allah bless him and grant him peace), or its reporters include a liar, e.g. the forty ahadith known as Wad'aniyyah or the small collection of ahadith which was fabricated and claimed to have been reported by `Ali al-Rida, the eighth Imam of the Ithna 'Ashari Shi'ah

Hujjiyyah of the Sunnah (The Proof Value)

1. Definition

- a. Hujjiyah is the proof value of the Sunnah as a source of law into the legal theory.
- b. The conduct of the Messenger of Allah sal'Allaahu 'alayhi wasallam was meant to establish a rule of Shari'ah and constitute a binding ruling.

Hujjiyyah of the Sunnah (The Proof Value) (cont.)

- 2. The Qur'an
 - 7: Muhsin Khan: What Allah gave as booty (Fai') to His Messenger (Muhammad SAW) from the people of the townships, - it is for Allah, His Messenger (Muhammad SAW), the kindred (of Messenger Muhammad SAW), the orphans, AlMasakin (the poor), and the wayfarer, in order that it may not become a fortune used by the rich among you. And whatsoever the Messenger (Muhammad SAW) gives you, take it, and whatsoever he forbids you, abstain (from it) , and fear Allah. Verily, Allah is Severe in punishment. [Surah al-Hashr, 59:7]

Hujjiyyah of the Sunnah (The Proof Value) (cont.)

3. The Sunnah

a. “Indeed I was given this Qur’an and something similar to it (Sunnah).”

4. Practice of the Sahaba

a. It was reported that the first Muslim Caliphs have issued instructions to their deputies and judges around the state in which they asked them to follow the Sunnah of the Prophet sal’Allaahu ‘alayhi wasallam whenever they could not find the answer in the Qur’an.

Hujjiyyah of the Sunnah (The Proof Value) (cont.)

5. Ijmaa'

a. Muslim jurists are unanimous on the fact that Sunnah is a source of Shari'ah, and that it stands on the same footing as the Qur'an. If there is an apparent contradiction between the Qur'an and Sunnah, we need to look at the historical background. Also we need to check if somehow it is abrogated. If we can't tell from historical areas, then both are dropped and other means are looked at. Therefore, those who say they follow the Qur'an but reject the Sunnah (Qur'aneeyoon) aren't actually following the Qur'an in the first place. The Hujjiyah (proof value) of the Sunnah becomes binding once the authenticity of that particular text of the Sunnah is determined i.e. Sahih or Hassan and Mutawattir (continuous reports) or Ahaad (solitary reports)

Classification of the Sunnah and Value: Legal vs. Non-Legal

1. What is legal and what is non-legal Sunnah?

a. Legal Sunnah, Sunnah Tashree'yah (literally: legislation)

i. The exemplary conduct of the Prophet sal'Allaahu 'alayhi wasallam , be it an act, saying or a tacit approval which incorporates the rules and principles of the Shari'ah.

ii. Wajib

“Pray as you see me pray.” [Bukhari]

iii. Mustahaab

“Was it not for my fear of imposing a difficulty on my Ummah I would have ordered that the Miswak be used for every salaah, and delay in Isha prayer.” [Bukhari]

Classification of the Sunnah and Value: Legal vs. Non-Legal (cont.)

b. Non-legal Sunnah, Sunnah Ghayr Tashree'iyyah

i. The natural activities of the Prophet sal'Allaahu 'alayhi wasallam such as the manners in which he ate, slept, dressed and such activities which do not seek to constitute a part of the Shari'ah or the legal norms.

1. The preference of the Prophet sal'Allaahu 'alayhi wasallam for certain foods: Anas reports, "I saw Allah's Messenger going after the pumpkin round the dish, so I have always liked pumpkin since that day."

2. This is not an act of ibadah (simply to eat pumpkin). However, if your intention was to like something that Muhammad sal'Allaahu 'alayhi wasallam liked, then inshallah, the intention will be rewarded.

Classification of the Sunnah and Value: Legal vs. Non-Legal (cont.)

3. Abdullah ibn Umar was the quickest to follow the non-legal Sunnah, to the point of taking the same footsteps as Muhammad sal'Allaahu 'alayhi wasallam and using the same rest stops when going for hajj.

4. Some Sunnah practices are difficult to tell whether they are legal or non-legal.

Classification of the Sunnah and Value: Legal vs. Non-Legal (cont.)

2. What is Hujjiyyah of each type of Sunnah?

a. Legal Sunnah

i. It establishes a Hukm Shar'ee. All commands and prohibitions that are imposed by the Sunnah are binding on every Muslim.

b. Non-legal Sunnah

i. The majority of jurists consider it an indication for permissibility (Mubaah), unless other evidence suggests otherwise.

Classification of the Sunnah and Value: Legal vs. Non-Legal (cont.)

3. Khusoosiyyaat An-Nabi

a. Certain matters which are particular to the person of the Prophet sal'Allaahu 'alayhi wasallam.

- i. Multiple marriages above the limit of four, connected fasting and the prohibition of remarrying his wives after his death.

4. What is the ruling of the Khusoosiyyah of the Prophet sal'Allaahu 'alayhi wasallam?

a. If the Qur'an addresses the Prophet sal'Allaahu 'alayhi wasallam with an exclusive term such as "O ye Messenger" then it is to the Prophet sal'Allaahu 'alayhi wasallam alone, unless there is conclusive evidence to suggest otherwise.

Coincidental actions of the Prophet sal'Allaahu 'alayhi wasallam such as his prayer inside the ka'bah in a certain position, praying in a specific location on his journeys or taking the pledge on Hudaibiyyah beside a particular tree do not constitute any ruling according to the vast majority of jurists.

Ijmaa' or Consensus of Opinion

a. Definition

i. The unanimous agreement of the Mujtahids of the Muslim Ummah of any period following the death of the Prophet sal'Allaahu 'alayhi wasallam on any matter.

I. This means 100% agreement, while consensus means almost 100% agreement.

Ijmaa' or Consensus of Opinion (cont.)

- II. Only Muslim Mujtahids can be involved in this process. Laymen and scholars of other faiths cannot issue legal verdicts.
- III. It was never used within the Prophet's sal'Allaahu 'alayhi wasallam time because there was no need.
- IV. The Mujtahids are not chosen or picked from a society; they are publicly and universally recognized as Muslim scholars.

Ijmaa' or Consensus of Opinion (cont.)

b. Is the Ijmaa' factual or relative evidence?

i. Majority of Muslim jurists accept the Ijmaa' as a universal consensus, while other jurists accept it as a valid concept in a relative sense, not as a factual evidence. This is because we cannot be sure that any Ijmaa' after the sahaba's time included all the 'Ulama or not.

ii. The only Ijmaa' which they accept as a factual evidence is the Ijmaa' of the Sahaba before they were dispersed.

Ijmaa' or Consensus of Opinion (cont.)

c. What is the value of Ijmaa'?

i. It reflects the natural evolution and acceptance of ideas in the life of the Muslim Ummah.

1. Selecting Abu Bakr as a caliph.

ii. It ensures the correct interpretation of the Qur'an and Sunnah. iii. It enhances the authority of rules that are of speculative origin.

For example, the prohibition of simultaneous marriage to the close relative of one's wife.

iv. It represents an authority of its own right once it is established.

Ijmaa' or Consensus of Opinion (cont.)

- d. There are two types of Ijmaa'
 - i. Explicit Ijmaa' or Ijmaa' Sareeh
 - 1. The Ijmaa' in which every Mujtahid expresses his opinion either verbally or by an action.
 - ii. Tacit Ijmaa' or Ijmaa' Sukooti
 - 1. The Ijmaa' in which some of the Mujtahids of a certain age express their opinion concerning an incident while the rest remain silent. This is not technically an Ijma' from a juristic perspective (because not everyone had their say, or they may not have spoken out for some other reason).

Conditions of Ijmaa'

What are the conditions of a valid Ijmaa' ?

Condition one:

There should be a number of Mujtahids available at the time when the issue is encountered.

Condition two:

There should be a universal consensus of all the Mujtahids on the issue encountered. The presence of any dissenting view precludes the possibility of the Ijmaa'.

Condition three:

The agreement of the Mujtahids on the juridical opinion must be demonstrated by their expressed opinions on that particular issue.

Classifications of Ijma'

IJMA IS CLASSIFIED INTO:

1. Absolute Ijma or regular Ijma. An absolute ijma ensures certainty of belief (yaqin). It is the positive in kind in which the jurists express their opinion on any matter. An ijma is said to belong to this category if it be in strict conformity with the requirements of law and proved by infallible testimony. It is called regular ijma. This consensus may be in two ways
 - a. By words (qaul) where the consensus is achieved by spoken words, by a recognized mujtahids expressing an opinion.
 - b. By deeds (fi'il) where consensus is established by unanimous practice.
2. Irregular Ijma: where there is no absolute certainty. in this case, if a particular opinion is expressed by some jurists and others do not contradict it.

Classifications of Ijma' (cont.)

3. Ijma-i Ummah: there was a time during the caliphate period when the people used to be unanimous in their opinions about any matter placed before them. This is supposed to be the most superior kind of Ijma. The reason how unanimity at such level was possible was the righteousness of the people who followed the end of the Prophet's period. They were the companions of the Prophet who could not be unanimous except on truth.

4. Ijma-i Ullama: is the consensus of the learned people only. It is the Ijma not of all the muslims but only of those muslims who are well versed in Islamic law and religion. Thus, such an Ijma assumed more sanctity in due course, and it is said that Ijma-i Ummah in fact virtually yielded in favour of Ijma-i Ullama.

5. Ijma-i Madina: this is the Ijma according to the place of celebration. Those learned people that used to reside in Madina, which was a seat of learning, used to express their considered opinions on matters referred to them this is why it is known as Ijma-i Madina, their consensus was symbolized as dogmas of Islam.

Qiyas or Analogical reasoning

a. Definition

i. Literally, it means measuring; technically it means: The application to a new case (Far') on which the law is silent of the ruling (Hukm) of an original case (Asl) because of the effective cause (Illah) which is in common to both.

ii. It is a branch of Ijtihad

iii. Applied to cases in which the Qur'an and Sunnah is silent

Qiyas or Analogical reasoning (cont.)

b. What are the essential requirements (Arkaan) of Qiyas?

i. First : Asl

1. The original case on which a ruling is given in the text & which analogy seeks to extend to a new case.

ii. Second: Far'

1. The new case on which a ruling is needed.

iii. Third: Illah

1. The effective cause which is an attribute of the Asl and is found to be common to the original and the new case.

a. Find this in the asl, and can find this in the far' also.

b. The Illah never fluctuates, regardless of the case being discussed and it must be generated before deciding upon the Hukm.

iv. Fourth: Hukm

1. The rule governing the original case which is to be extended to the new case.

a. This is based on characteristic/reason which makes it similar to the new case.

Qiyas or Analogical reasoning (cont.)

c. Example

i. Wine versus narcotic drugs

1. Asl

a. Wine drinking

2. Far'

a. Taking narcotic drugs

3. Illah

a. Intoxicating effect

4. Hukm

a. Prohibition

Qiyas or Analogical reasoning (cont.)

ii. Gold vs. bank notes

1. Asl

- a. Paying zakah on legal amount of gold.

2. Far'

- a. Paying zakah on currency made of bank notes or other metals.

3. Illah:

- a. The value of all commodities.

4. Hukm

- a. Obligatory

Qiyas or Analogical reasoning (cont.)

3. Conditions of Arkaan Al-Qiyas

a. Condition of Asl

- i. Asl must be constituted in the Qur'an and the Sunnah and according to the majority of jurists by Ijmaa'.
- ii. Asl may not be constituted by a former Qiyas.

b. Conditions of Far'

- i. The new case may not be covered by the text or Ijmaa'.
- ii. The effective cause of the analogy must be applicable to the new case in the same way as to the original case.

Qiyas or Analogical reasoning (cont.)

c. Conditions of the Illah

- i. The effective cause must be a constant attribute (Mundhabit) i.e. applicable to all cases without being affected by differences of persons, time, place, and circumstances.
- ii. The Illah must be evident not hidden.
- iii. The Illah must be a proper attribute and bears a reasonable relationship to the law of the text.
- iv. The Illah must be an objective quality which can be transferable to other cases.
- v. The Illah must not be an attribute that runs counter to or seeks to alter the law of the text.

Qiyas or Analogical reasoning (cont.)

d. Conditions of hukm

- i. The hukm must be of a practical ruling of Fiqh.
- ii. The hukm must be operative, not abrogated.
- iii. The hukm must be rational or the Illah is clearly given in the text itself.
- iv. The hukm must not be confined to an exceptional situation or to a particular state of affairs.

Qiyas is the most dynamic part of Usool Al-Fiqh which is what makes the Shari'ah so alive and contemporary.

The Illah and Hikmah are not interchangeable. The Illah for shortening prayers while traveling, for example, is that one is traveling. Therefore, any person who is traveling may shorten the prayers. The hikmah is that journeys are difficult, and so prayers are shortened. However, even if you have an easy journey, it doesn't mean you cannot shorten your prayers.